



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 28, 2004

Ms. Patricia J. Acosta
Assistant District Attorney
Thirty-Fourth Judicial District
500 East San Antonio Street, 2nd Floor
El Paso, Texas 79901-2420

OR2004-3485

Dear Ms. Acosta:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 200215.

The Office of the District Attorney of the Thirty-Fourth Judicial District (the "district attorney") received a request for any information "pertaining to the arrest, investigation and trial of cause number 970D03833[.]" You state that you have released some of the responsive information. However, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the requestor asserts that the requested information has previously been provided to the requestor and the attorney for the criminal defendant in this case. You only acknowledge that the defendant's attorney was allowed to review the state's case file in compliance with court-ordered discovery. This office has ruled that exchange of information among litigants in informal discovery is not considered a voluntary release of information. *See* Open Records Decision No. 579 (1990). Likewise, when a governmental body discloses information because it reasonably concludes it has a constitutional obligation to do so, it can still invoke the law enforcement exception. *See* Open Records Decision No. 454 (1986); *see also* *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution is required to provide defense with all potentially exculpatory evidence). You make no representation as to whether or not this information has been previously released to the requestor. Whether this information has previously been voluntarily released is a fact question that cannot be addressed in the ruling

process. *See* Attorney General Opinion JC-0534 at 1 (2002) (this office does not make factual determinations in opinion process). We therefore must rely on a governmental body's representations with regard to such issues. Based on the district attorney's representation, we conclude that the district attorney has not previously released to the public any of the requested information that it now seeks to withhold. We will therefore address the district attorney's claim that the submitted information at issue is excepted from disclosure under section 552.108 of the Government Code.

Next, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information consists of a completed investigation. Consequently, this information must be released unless it is confidential under other law or excepted from disclosure under section 552.108. Section 552.103 is a discretionary exception under the Act and, as such, does not constitute "other law" for purposes of section 552.022(a)(1).¹ *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential). Consequently, we do not address your section 552.103 claim with regard to the submitted information. However, as you also assert section 552.108 of the Government Code, we will address your arguments under this exception.

Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime... if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere

¹ Discretionary exceptions are intended to protect only the interests of the governmental body as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 200215

Enc. Submitted documents

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(w/o enclosures)